No. 80 499

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

GEORGE R. WILLIAMS, et al.,
Petitioners,

vs.

PACIFIC MARITIME ASSOCIATION, a non-profit corporation, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, an unincorporated association, and I.L.W.U. LOCAL No. 10,
Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I
INTRODUCTION

The 51 petitioners were part of a group of some 530 Pacific Coast longshoremen who applied in 1963 for promotion from a Class "B" status with limited employment rights to "A" status carrying full employment status. Over 80 percent met the promotion standards.[1] Petitioners did not. Two courts below have held that

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[1]The relevant standards included (a) availability for employment, (b) prompt payment of each man's pro-rata share of the expenses of the dispatch hall, (c) not cheating on fellow workers in the procurement of employment and (d) freedom from employer complaints of intoxication.

petitioners have not been denied any rights under their collective bargaining contract and have not been denied fair representation by their union. Petitioners ask this Court to review and overturn those decisions of the courts below.

This case has had a long and tortuous passage through the lower federal courts. Petitioners filed their first complaint over sixteen years ago on April 18, 1964. Pet.App. 61.[2] Successive pleading failures finally led to the fourth amended complaint which the district court also dismissed. Petitioners then filed their first appeal to the Ninth Circuit Court of Appeals. Between completion of briefing and oral argument, this Court handed down *Vaca v. Sipes,* 386 U.S. 171 (1967), the landmark decision on the duty of fair representation. The court of appeals thereupon returned petitioners' case to the district court for further proceedings. *Williams v. Pacific Maritime Association,* 384 F.2d 935 (9th Cir.) *cert. denied* 390 U.S. 987 (1967). The district court excised portions of the fourth amended complaint and dismissed the claims against the individual defendants. Petitioners again resorted to the court of appeals which affirmed the lower court. *Williams v. Pacific Maritime Association,* 421 F.2d. 1287 (9th Cir. 1970).

With the form of the complaint finally settled, the matter came to trial on January 10, 1974. The taking of live testimony continued for six months. The final trial record consisted of 7448 pages of testimony, approximately 1000 exhibits and a 293 page stipulation as to testimony.[3] The trial court ruled against petitioners.

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[2]Designation of References. We shall refer to the Petition for Writ of Certiorari as Pet., to petitioners appendix as Pet.App. and to our appendix as Resp.App. each to be followed with appropriate page numbers.

[3]The stipulation contained the following:

> The [District] Court now has before it a record that will permit it to make lawful and proper credibility findings, to be given their usual weight on appeal, as to items of testimony submitted by this stipulation and as to any witness who is deemed to give

For the third time petitioners took their case to the court of appeals. After extensive argument, that court affirmed the judgment below. *Williams v. Pacific Maritime Association*, 617 F.2d 1321 (9th Cir. 1980). In their petition to this Court, petitioners take what should be the last step to bring this protracted proceeding to a close.[4]

Petitioners urge this Court to accept their version of the facts. They have quoted and referred to bits of the record to construct a version of the facts which has been rejected by the two courts below. They have totally ignored the balance of the vast record which paints an entirely different picture. We accept the factual statement of the court of appeals and shall not reargue the facts here.

Petitioners submitted an Appendix which contains scraps of evidence to support their factual contentions. We have submitted an Appendix which contains substantially more of the record below but which is still only a fraction of the mammoth record from which the district court drew its findings. Our Appendix contains sufficient excerpts from the record to support the district court's findings on all issues raised by petitioners.

Our effort shall be devoted to showing that petitioners offer no legal issues justifying a grant of a writ of certiorari. We shall show that petitioners attack a decision bearing little resemblance to the decision of the court below.

Petitioners offer six Questions Presented for Review. We discuss each in detail below. None justifies review by this Court. None raises a question of conflict among the circuit courts. None poses an important federal legal issue of first impression

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testimony hereunder, and a record upon which the Court can resolve the relevant and material conflicts, if it finds any, within the testimony here presented or between items of the testimony here presented and the balance of the record herein. Resp.App. 112-13

[4]Proposed *amici* seek to raise an issue which petitioners themselves do not raise here and did not raise in the court of appeals. *Cf. Rosenberg v. United States*, 346 U.S. 273, 291-92 (1953). ("We discountenance this practice." *Id.* at 292.)

which this Court should resolve. None suggests that the Ninth Circuit failed to follow any decision of this Court. Although the Questions Presented for Review show petitioners' displeasure with the outcome of their case, petitioners cannot seriously argue that the court below departed from the accepted and usual course of judicial proceedings.

Petitioners principal legal arguments are that the Ninth Circuit Court of Appeals departed from the "teachings' of this Court by refusing to view arbitrary conduct as an independent ground for finding a breach of the duty of fair representation and created conflicts among the courts of appeals as to whether each recognizes arbitrary conduct as a distinct basis for finding a breach of the duty of fair representation. In Section III below we show that these arguments are without merit.

II.
PETITIONERS' QUESTIONS FOR REVIEW DO NOT WARRANT GRANT OF CERTIORARI

Petitioners pose six questions for review by this Court. As stated above, not one justifies review by the Court. An analysis of the decision below refutes petitioners' position. Below we analyze each of petitioners' Questions Presented for Review.

A. The factual situation of this case does not warrant reexamination by this Court.

Petitioners' first two questions for review ask this Court to reexamine whether the union's duty of fair representation was breached in a particular and individualistic factual configuration.[5] Such reexamination is not within the limited and specific

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[5]Petitioners' first and second Questions Presented for Review are:

1. Whether or not a union breaches its statutory duty to provide fair representation when it agrees to the discharge of a large number of members of the collective bargaining unit for work-related infractions which were not the subject of a discharge penalty when the infractions occurred during the previous four years of employment?
2. Whether or not a union breaches its duty to provide fair representation when it agrees to the discharge of a large

function of certiorari to the nation's highest tribunal. The rules of this Court specifically state that review on certiorari "is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." SUP.CT. R. 19(1). Petitioners do not demonstrate any special or important reasons in this case.

As evidenced by the long history of opinions below, petitioners have already had their days in court. The issues involved in this case have now been litigated three times in the appeals court. The particular judgment at issue was rendered after a lengthy trial in the district court. It would not be appropriate for this Court once again to sift through the specific factual circumstances of this case.

The issues raised by petitioners in the first two questions were adequately and thoroughly examined by the courts below. One by one the court of appeals discussed the facts underlying the allegations of petitioners as to the duty of fair representation claims, and each time the court concluded no breach had occurred. 617 F.2d at 1330-34; Pet.App. 16-24. The court of appeals opinion correctly applied the duty of fair representation doctrine as articulated by this Court, by its own prior decisions and by the other appeals courts for other circuits. Its decision on the facts reconfirmed the findings and conclusions of the district court. After their unsuccessful appeal to the Ninth Circuit, petitioners requested reconsideration. However, neither the panel that heard the case nor any single judge of the Ninth Circuit even requested a vote on the suggestion for rehearing *en banc*.

Thus petitioners have already made several unsuccessful attempts to convince the lower courts that their version of the facts constituted a breach of the union's duty of fair representa-

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number of members of the collective bargaining unit for conduct which was not in violation of any provision of the collective bargaining agreement or applicable working rules at any time during the previous four years of employment?

tion. They now request this Court to review the record once again. Mr. Justice Holmes, speaking for the Court, ruled that such repeated inquiry into particular facts is an inappropriate task for the Supreme Court. "We do not grant certiorari to review evidence and discuss specific facts." *United States v. Johnson,* 268 U.S. 220, 227 (1925).

As this Court recently noted in *International Union of Electrical Workers v. Foust,* 442 U.S. 42, 46 n. 7 (1979), the review of an evidentiary question in a breach of the duty of fair representation case is a factual matter for which this Court is "unwilling to substitute [its] judgment for that of the jury, District Court, and Court of Appeals. . . ."[6] See also *Stuart v. Hayden* 169 U.S. 1, 14 (1898); *Baker v. Schofield,* 243 U.S. 114, 118 (1917); *Graver Tank and Manufacturing Co. v. Linde Air Products Co.,* 336 U.S. 271, 275 (1949); *Berenyi v. Director, INS,* 385 U.S. 630, 635-36 (1967).

The petitioners' first two Questions Presented for Review turn on the particular facts of this case alone and are of interest only to the instant parties. This Court has affirmed that when issues presented are insignificant to the general welfare a grant of a writ of certiorari is inappropriate. *Layne & Bowler Corp. v. Western Well Works, Inc.,* 261 U.S. 387, 393 (1923); *Rice v. Sioux City Memorial Park Cemetery, Inc.,* 349 U.S. 70, 79 (1955).

In effect, petitioners request this Court to delve into yet another review of the lengthy record of this case in the hope that it may weigh the evidence differently than the two prior courts and find what those courts have been completely unable to find: Proof of the union's breach of its duty of fair represen-

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[6]More recently in *Williams v. International Ass'n. of Machinists,* ___ U.S. ___ (No. 79-2007) 49 U.S.L.W., 3210, 3234 (October 6, 1980) this Court refused to reexamine a court of appeals' *per curiam* affirmance without opinion of a district court's findings and conclusions in a case involving a claim of the breach of the duty of fair representation. *Williams v. International Ass'n. of Machinists,* 617 F.2d 441 (5th Cir. 1980).

tation to petitioners. That is not the function of certiorari and the writ should be denied.[7]

B. This case presents no issue of the "preclusive effect" of National Labor Relations Board decisions upon federal courts.

In their third Question Presented for Review, petitioners ask this Court to decide a matter that is not an issue in this case. Petitioners assert that the courts below gave "preclusive effect" to a decision of the National Labor Relations Board. The assertion is without merit.[8]

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[7]While petitioners argue that this Court "may" review findings of fact under the "two court rule" if there is a "very obvious and exceptional" showing of error, Pet. 35, they have failed to make such a showing here. To the contrary, as this response demonstrates, no such showing is possible. In that situation, the admonition in *Graver Tank, supra,* is particularly apposite: "A court of law such as this Court is, rather than a court for the correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below . . ." 366 U.S. at 275. *Berenyi, supra,* stated the policy underlying the two court rule:

> The policy underlying the 'two court' rule is obvious. This Court possesses no empirical expertise to set aside the careful and reasonable conclusions of lower courts on purely factual issues. When, as here, resolution of the disputed factual issues turns largely on an assessment of the relative credibility of witnesses whose testimony or demeanor was observed only by the trial court, the rule has particular force. 385 U.S. at 636.

The *Berenyi* court noted an exception in the case of constitutional issues, 385 U.S. at 636, none of which are present here. In *United States v. Ceccolini,* 435 U.S. 268 (1978) this Court reiterated its "traditional deference to the 'two court'" rule and left undisturbed the court of appeals affirmance of a district court finding of fact except where a constitutional question was involved. *Id.* at 273-279. *Rose v. Mitchell,* 443 U.S. 545 (1979) was not a "two court rule" case. In any event, it involved the constitutional claim of racial discrimination in jury selection.

[8]Petitioners' third Question Presented for Review is: "Whether or not a decision of the National Labor Relations Board involving other persons similarly situated, but never subjected to judicial review, is entitled to preclusive effect upon a later case in the courts for unfair representation and breach of the collective bargaining agreement?"

In its findings numbered 125 and 126, the district court found as a fact that the National Labor Relations Board decided, *inter alia,* that the use of the late payment of pro-rata as an explicit promotion standard for Class "B" longshoremen did not violate the National Labor Relations Act. Pet.App. 67-68. The district court, however, made no conclusions of law based on the Board's decision. Nothing in the district court's conclusions of law can be read to support the idea that the district court considered itself bound by the Board's decision and petitioners do not suggest as much. The district court's decision on whether the union breached its duty of fair representation rested upon its view of the evidence presented to it and not upon the decision of the National Labor Relations Board.

In this posture, the Ninth Circuit reviewed the district court's decision. That court's entire treatment of the Board case occupies only a few lines of the opinion. 617 F.2d at 1333; Pet.App. 23. Beyond cavil, the Ninth Circuit did not give "preclusive effect" to the NLRB decision. The court did no more than independently agree with the Board's conclusion.

Despite the foregoing, petitioners erect a strawman argument based upon the premise the "federal courts are not and should not be precluded from examining an issue resolved by the Board years earlier when different legal principles and standards applied." Pet. 31.[9] The premise has no application to

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[9]The implication of petitioners' position is disturbing in that it would follow that a person could engage in activity lawful under the then prevailing standards but later could be assessed civil damages based upon subsequently changed law.

the facts of this case. A reading of the circuit court's opinion and the findings and conclusions of the district court reveal that neither court considered that the Board decision precluded it from examining the merits of the case. Petitioners' real complaint is that all three tribunals independently reached the same conclusion adverse to petitioners' position.

If any justification exists for this Court to review the res judicata or collateral estoppel effect of Board decisions upon subsequent court cases (and we see none), this case is not an appropriate vehicle for such review.[10]

C. This case presents no issue of the waiver of an employee's right to fair representation or the right to be discharged only for good cause.

In their fourth Question Presented for Review, petitioners ask for review based on their assertion that the court below concluded that the language in the application for Class "B" registration which each petitioner signed constituted a waiver of fair representation and that the collective bargaining parties considered petitioners' acceptance of employment as a waiver of

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[10]If the issue were properly here it would have to be noted that petitioners themselves filed NLRB charges raising the same issues (Exhibit AH) which were ultimately dismissed. Under this circumstance, the courts below, had they in fact regarded the Board's decision as "preclusive," would have been justified in finding collateral estoppel. *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394 (1966); *Paramount Transp. Sys. v. Chauffeurs, Local 150*, 529 F.2d 1284 (9th Cir.), *cert. denied* 426 U.S. 908 (1976); *Paramount Trans. Sys. v. Chauffeurs, Local 150*, 436 F.2d 1064 (9th Cir. 1971). Petitioners' reliance on *Stewart v. Travelers Corp.*, 503 F.2d 108 (9th Cir. 1974) is wide of the mark. *Stewart* presented the question of whether the Consumer Credit Protection Act of 1968, 15 U.S.C. §§1601, *et seq.*, which prohibits discharge of an employee for a garnishment for one indebtedness, created a private cause of action. Nothing in *Stewart* spoke to a collectively-bargained requirement that workers share the cost of operating the facility through which they are dispatched to employment.

their right to be discharged only for good cause.[11] These conclusions are ones the court below never made. While the court of appeals did quote the language of the application[12] and the rules[13] it referred to this and other evidence to support the district court's findings and conclusions that respondents adequately warned petitioners that misconduct could lead to deregistration.[14] In its discussion of this evidence the court below

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[11]Petitioners' fourth Question Presented for Review is "Whether or not members of the collective bargaining unit may be compelled to agree to the waiver of their rights to fair representation and to be discharged only for good cause as a condition of employment?"

[12]Class "B" registration, if granted, shall be subject to agreements between the PMA and ILWU, or their successors, and to *rules with respect to registration and deregistration* established by said parties; I understand that registered longshoremen may be deregistered and that *registration may be revoked in accordance with such agreements and such rules now in effect or hereafter to be agreed upon or adopted* by the Association and the Union of their successors or by the Joint Port Labor Relations Committee. (Emphasis added by court). 617 F.2d at 1332; Pet.App. 19.

[13]Deregistration of Limited Registration (Class "B") Longshoremen. (a) *A Class "B" longshoreman may be deregistered for cause by the Joint Labor Relations Committee (in accordance with such rules or uniform procedures as may be established or followed by such Committee)* if the Committee finds:

> (i-x) any of ten types of misconduct or inadequacy for the job of longshoreman;
>
> (xi) or for any other cause, provided that neither membership or nonmembership in the union nor activity or nonactivity for or against the union shall be a factor in considering applications for registration or in deregistration.

(Emphasis added by court). 617 F.2d at 1331-32; Pet.App. 19-20.

[14]The District Court's finding that plaintiffs were adequately warned is amply supported by the record. *E.g.*, Resp.App. 115-18 ("I remember hearing such warnings from a number of the union officials during the B Men's meetings . . . I acknowledge that I and all other B Men had to keep an absolutely clean record . . . [w]e were told on various occasions that the union expected strict observance of all rules by us . . ."); *id.* at 130, 135-36 ("I was from time to time admonished 'keep your nose clean' by the union".)

stated: "We are convinced, however, that the union supplied the employees with repeated and adequate warning that misconduct of which they were guilty could be the basis for their failure to advance to Class 'A' status." 617 F.2d at 1331; Pet.App. 19.

Neither court below rested its decision upon the suggestion that plaintiffs had waived any right to fair representation or any right to be discharged only for good cause.[15]

Petitioners' reliance upon *J.I. Case v. NLRB*, 321 U.S. 332 (1944) is misplaced. There this Court rejected an employer's attempt to use individual employment contracts as a bar to entering into collective bargaining agreements with a union. Here the court below did not hold that the 1958 Rules and the 1959 applications were individual contracts. To the contrary, the court of appeals specifically held that they were part of the collective bargaining agreement. The court stated:

> The 1958 Rules as well as the 1963 standards for deregistration were validly adopted by the Port Committee in accordance with the second clause in ... [subsection 17.851 of the collective bargaining agreement]. Under that clause the Port Committee was entitled to promulgate future registration rules and procedures subject to the action of the Coast Committee setting them aside in exercise of its ultimate power over this subject. 617 F.2d at 1334; Pet.App. 25.

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[15]Petitioners position is curious. They argue that they were never warned that misconduct could result in deregistration and that the failure to warn them was a breach of the duty of fair representation. When confronted with the evidence cited by the court to show ample warning, petitioners argue that the warnings they acknowledge receiving should be ignored because such warnings themselves were "waivers" of their right to fair representation and to be discharged only for good cause. The record demonstrates that petitioners ignored the warnings because they thought they could get away with it. Resp.App. 120, 135, 137. It takes little imagination, to use petitioners' language, Pet. 29, to envisage the argument petitioners would now be making if they had not been given these advance warnings.

The other cases cited by petitioners are inapposite. Respondents do not quarrel with the statement in *Bisso v. Inland Waterway Corp.*, 349 U.S. 85, 90 (1955) that contracts contrary to public policy are invalid. Respondents point out, however, that the instant case does not involve enforcing a contract with petitioners, but rather of determining from the record whether petitioners along with 480 other longshoremen were put on notice from the beginning that their misconduct could lead to their deregistration.

Finally, petitioners refer to *Archie v. Chicago Truck Drivers' Union*, 585 F.2d 210 (7th Cir. 1978), which is referred to as the "only ... other" case involving "a union requirement that an employee maintain an absolutely clean record." Pet. 30.[16] The case is not at all in point. In *Archie* an EEOC case was dismissed at the pleading stage.

> Archie has claimed in his first amended complaint that the Union in effecting his reinstatement required him to sign a statement of conditions of continued re-employment *which it knew he would be unable to meet and which was never required of white employees.* He has also claimed that the Union arbitrarily failed to represent him following his second discharge. These claims constitute factual allegations sufficient *to prevent dismissal of his complaint at this early stage of the proceedings.* (Emphasis added). 585 F.2d at 220.

This is a far cry from the instant case which presents no issues of racial discrimination (Resp.App. 126) and in which, after a protracted trial, it appears that the condition imposed on petitioners—to avoid misconduct which could lead to their discharge—was one that the union had the right to expect could be met by responsible employees and which in fact was easily complied with by 80 percent of petitioners' fellow workers.

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[16]Petitioners overstate the facts; the two documents referred to are not "union requirement(s)." They are joint rules and a joint application for employment.

The fact that over 80 percent of the Class B men met the standards demonstrates that the overwhelming majority of them were aware of their obligations under the contract and that the union was remarkably successful at obtaining permanent status for the Class B men. 617 F.2d at 1334; Pet.App. 24.

D. This Court should not review the merits of a breach of collective bargaining agreement where there is a final and binding decision in the contractual grievance procedure.

In their fifth Question Presented for Review, petitioners ask this Court to get involved in deciding a breach of collective bargaining agreement issue.[17] They contend that they were de-registered without good cause and in violation of the common law of the shop.[18] The court below pointed out that Joint Coast

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[17]As their fifth Question Presented for Review, petitioners state: "Whether or not the union and employer breach the collective bargaining agreement when they jointly agree to discharge a large number of members of the bargaining unit without 'good cause' and in violation of the past practices of the 'common law of the shop?'

[18]Petitioners, citing *Day v. United Auto., Aerospace & Agricultural Implement Workers*, 466 F.2d 83, 90-92 (6th Cir. 1972) argue that "[w]here an employee is not at fault he cannot be disciplined, and discharged for cause means for 'good cause'". Pet. 38. These truisms have no application to this case. In the instant case each petitioner was found after trial to have been "at fault" for violating one or more of the rules and was found to have been discharged for one or more causes which both of the courts below found were "good": violation of the LMO rules or the intoxication rule, or failure to make timely payments of pro rata, or failure to make himself available for work. *Day* reversed a summary judgment "before hearing of the evidence," 477 F.2d at 86, and held that on the facts *alleged* in that case, there were issues which required a full trial *id. Cf. Lewis v. Magna Am. Corp.*, 472 F.2d 560, 561 (6th Cir. 1972) where the court that decided *Day* distinguished it *on the facts*. Here, of course, the trial has been had. After weighing the evidence, both courts below have found that petitioners were at fault for not heeding the

Committee unanimously agreed that petitioners' breach of contract claims were not meritorious and that that decision was final and binding. 617 F.2d at 1327-28; Pet.App. 11-12. In the absence of a determination that a breach of the duty of fair representation occurred, petitioners are not entitled to further review. *Vaca v. Sipes,* 386 U.S. 171 (1967); *General Drivers Local 89 v. Riss & Co.,* 372 U.S. 517 (1963).

Petitioners seek to avoid the finality of the Coast Committee decision by implying that that Committee retroactively amended the contract. Petitioners argue that the court below erred because it held that "the contract could be amended and adversely affect" their rights. Pet. 28. The court of appeals held no such thing. What the court held was:

> Thus, there were no rules retroactively turning permitted actions of [petitioners] into misconduct. The actions found to be cause for deregistration were all misconduct under

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warnings constantly given them and that each petitioner was discharged for one or more of the good causes mentioned above. *Day* is simply not analogous to this case.

Equally inapposite is *Boone v. Armstrong Cork Co.,* 384 F.2d 285 (5th Cir. 1967) which petitioners cite for the proposition that "a restriction on an employer's right to discharge at will may be implied." Pet. 39. Whether that be true or not, neither court below held in this case that the employer had a right to discharge at will. On this record, the courts below held that petitioners were not discharged at the will of the employer but for having failed to conform with well known pre-existing rules of conduct with which 80 percent of the workers were able to comply without any difficulty. These findings are not clearly erroneous.

In this case there was no "misunderstanding", as there was in *Boone,* which could be used to forgive petitioners' violations of the rules. *Id.* at 290. *Boone* furthermore points out, *id.* at 291, as did the court of appeals in this case (*infra*), that a final decision reached in the grievance-artibration machinery is binding upon the employee as well as upon the union and the employer.

> Port Committee rules in effect throughout the period of [petitioners'] registration. This fact and the observation that [petitioners] were warned repeatedly that their records would be reviewed upon consideration for advancement to Class "A" status are sufficient to support the district court's conclusion that the union did not breach a duty to warn of conduct that might lead to deregistration. 617 F.2d at 1332; Pet.App. 22.

Petitioners reliance upon *Humphrey v. Moore,* 375 U.S. 335 (1964), fails for two reasons. First, it is based upon their unwarranted assumption that respondents amended the collective bargaining agreement. Second, it misreads the opinion. Petitioners argue that such amendment was unlawful because a majority of this court "rejected" the view of Justices Brennan and Goldberg in *Humphrey v. Moore,* that the parties to a collective bargaining contract are "free by joint action to modify, amend and supplement their original collective bargaining agreement." All the majority said on the point was that it would "assume" that a joint committee's power was "circumscribed" by the agreement (*Id.* at 345) but added "we need not consider the problem posed ... if the parties had acted to amend the provision." *Id.* at n. 7.[19]

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[19]The language petitioners quote from *Price v. International Bhd. of Teamsters,* 457 F.2d 605, 610 (3d Cir. 1972), Pet. 28, has to do with the so-called Bill of Rights, 29 U.S.C. §414, and not with Section 301, 29 U.S.C. §185. In any case, in *Price,* the court of appeals, as did the court below, found that *on the record before it* there was no breach of the duty of fair representation. It is clear from all these cases that the district courts are determining breach of duty cases under correct legal standards. However, they obviously come up with varying results because the facts of the cases are different. The various courts of appeals, like the court of appeals in this case, examine the record before them and determine whether or not the findings of the trial court were clearly erroneous. None of this presents any question for review by this Court.

E. This Court need not grant certiorari to determine that the court below diligently performed its judicial function.

In their sixth Question Presented for Review, petitioners complain that the Ninth Circuit Court of Appeals abdicated its judicial responsibility.[20] Reading the opinion of the court below should dispel any even colorable merit to this claim. The opinion abounds with references to the evidence and to appropriate legal authorities. Ignoring these, petitioners stretch to find proof of abdication.

Petitioners complain that the court below could not have considered the record because it referred to Class "B" men as provisional or probationary. Pet. 33. The court was fully aware of petitioners' tenure in the industry. In its opinion, the court points out that petitioners applied for registration in 1959 and were deregistered four years later in 1963. 617 F.2d at 1324; Pet.App. 5. The opinion also demonstrates that the court below knew that petitioners were "full-time." The court's opinion frequently refers to the 70 percent availability rule which was applicable to petitioners. 617 F.2d at 1324, 1332-33; Pet.App. 4, 21, 23. The rule defined what "full-time" means in the longshore industry. Quite clearly the court below understood that petitioners had been full-time employees for four years. More importantly, the court below recognized that they held a

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[20]The sixth Question Presented for Review states: "Whether or not the Court of Appeals abdicated its responsibility to make an independent review of the record when it simply approved the findings of the District Court which were merely xeroxed copies of the findings submitted by the prevailing parties?"

status below that of full Class "A" registration.[21] The use of the words "provisional" or "probationary" is appropriately descriptive of petitioners' status and raises no question for review by the Court.[22]

Petitioners assert that the court abdicated its judicial responsibility because it believed that petitioners were deregistered for misconduct rather than for failing to satisfy the explicit promotion standards. Pet. 34. This is a semantic squabble. It is true that all Class "B" men who failed to win promotion were deregistered. It is equally true, as the court of appeals found, that but for petitioners' misconduct, they would not have been deregistered but instead would have been promoted. In any event, the court's statement does not justify the conclusion that it abdicated its responsibility or that this Court should undertake to rewrite the opinion below.

Petitioners suggest that the court below abdicated its responsibility because it misunderstood the pro-rata standard. Pet.

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[21]"The agreement provided for two classes of longshoremen, the preferred employees, called Class A, and the limited registered longshoremen, Class B. In operating the hiring hall, the Port Committee distributed work among longshoremen according to their registered status. Fully registered Class A longshoremen received priority for available work. Class B longshoremen had limited rights to available work, were subject to stricter rules and more stringent penalties than were applicable to Class A workers . . ." 617 F.2d at 1323-24; App. 2-3.

[22]The district court defined the status of Class "B" longshoremen in its finding number 32. It stated: "From the day that each Class "B" man gained limited registration, he was repeatedly and clearly informed that he was a second-class category, that he had to keep his "nose clean," that he should live up to all the rules, that he could be deregistered for failing to live up to the rules, and that the union and the employer were keeping records with respect to his misconduct to which they would give consideration when the time came for him to be reviewed for promotion." Pet.App. 38. The record amply supports this finding. See *n. 14 supra.*

35. Petitioners read the opinion to mean that the court below believed that petitioners were deregistered for nonpayment of pro-rata. The opinion shows no confusion that it was late payment that led to denial of promotion and then to deregistration. The court below quoted the relevant standard:

> Any Class "B" longshoreman found to have been late in the payment of his pro-rata eight or more times (or six or more times with an otherwise blemished record) shall be considered ineligible for advancement to Class "A" registration. 617 F2d at 1324; Pet.App. 4.

Nothing in the court's opinion suggests that it believed the standard to be nonpayment rather than late payment.

Petitioners complain that the court below did not point to the evidence showing that petitioners were told they could lose their jobs for the various violations of which they were admittedly guilty. The district court found that petitioners were so informed. The court of appeals in reviewing the record found, as the record required it to find, that this finding was not erroneous. In the Appendix to this brief is set forth some of the evidence from this voluminous record which establishes that each petitioner was fully informed of the consequences of failure to maintain a clean record. Petitioners' quarrel is with the record—much of it stipulated to by them—not with the correct application of the legal principles to the record.

Petitioners argue that the court of appeals failed to make an independent review of the record and that it was "dead wrong" about the record, etc. Pet. 33-34. In this way, petitioners ask this Court, under the guise of a certiorari petition, to review 7448 pages of testimony, 1000 exhibits and 293 pages of jointly stipulated facts. They make this request in the face of the fact that the court of appeals, without dissent, concluded that the district court's findings of fact were not clearly erroneous.

In addition to the questions presented and discussed above, petitioners argue that the Court of Appeals failed to follow the teachings of this Court and needlessly contributed to existing conflicts among the circuits in fair representation cases. Pet. 25-28. Neither of these contentions is well taken.

III
THE COURT OF APPEALS DID NOT DISREGARD THE "TEACHINGS" OF THIS COURT NOR DOES ITS DECISION CONFLICT WITH THE DECISIONS OF ANY OTHER COURT OF APPEALS

As noted above, the Ninth Circuit remanded Petitioners' first appeal in this matter to the district court for reconsideration in light of this Court's landmark decision in *Vaca v. Sipes,* 386 U.S. 171 (1967). *Williams v. Pacific Maritime Association,* 384 F.2d 935 (9th Cir.) *cert. denied,* 390 U.S. 987 (1967). From that decision forward, the Ninth Circuit has recognized and followed the teachings of this Court.

Vaca grew out of *Steele v. Louisville & Nashville Railway,* 323 U.S. 192, 202 (1944), where this Court held that an exclusive bargaining agent had a duty to avoid racially discriminatory conduct. *Id.* The Court in *Vaca* extended the duty to encompass not only racial discrimination, but all union conduct which is "arbitrary, discriminatory, or in bad faith." 386 U.S. at 190. By this and other statements in its opinion, the Court established "arbitrary conduct" as one of the grounds for a finding of breach of the duty of fair representation.

Later this Court seemed to eliminate arbitrary conduct as an independent basis for a breach of the duty of fair representation. *Amalgamated Association of Street, Electric Railway & Motor Coach Employees v. Lockridge,* 403 U.S. 274, 299 (1971). *Lockridge* dealt principally with NLRB preemption of jurisdiction. The Court said, in *dicta,* that for a breach of the duty of fair representation to occur, "there must be substantial evidence of fraud, deceitful action or dishonest conduct." *Id.*

While the Ninth Circuit in *Retana v. Apartment, Motel, Hotel & Elevator Operators Union Local No. 14,* 453 F.2d 1018 (9th Cir. 1972) noted the uncertainty which *Lockridge* appeared to place on the standards for union action, it concluded that "the *Vaca* opinion's repeated reference to arbitrary union conduct reflects a calculated broadening of the fair representation standard." *Id.* at 1023 n.8. Two years later, the Ninth Circuit once again

applied this Court's "arbitrary" standard. *Beriault v. Local 40, Super Cargoes & Checkers of the International Longshoremen's & Warehousemen's Union*, 501 F.2d 258, 264 (9th Cir. 1974). The interpretation given by the Ninth Circuit in these cases presaged later decisions of this Court.

Recent Supreme Court articulations of the standards for union conduct in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) and *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979) clearly reaffirm the guidelines enunciated in *Vaca* that arbitrary conduct is an independent ground for a breach of the duty of fair representation.[23] In *Foust* this Court was specific: "In particular, a union breaches its duty when its conduct is arbitrary, discriminatory, *or* in bad faith." (emphasis added). 442 U.S. at 47, citing *Vaca*, 386 U.S. at 190.

After *Hines* and *Foust*, the Ninth Circuit continued to hold that arbitrary conduct was sufficient to constitute a breach of the duty of fair representation. In *Robesky v. Qantas Empire Airways, Ltd.*, 573 F.2d 1082, 1091 (9th Cir. 1978), the Ninth Circuit held a union could breach its duty of fair representation if it acted "arbitrarily" even in the absence of bad faith or discrimination.

In the instant case, the court below demonstrated its knowledge of, and correctly applied, this Court's holdings in fair representation cases. In Part III of its opinion, 617 F.2d at 1328-34; Pet.App. 12-24, the court of appeals thoroughly examined the law relating to the duty of fair representation. It cited and relied upon the very cases petitioners use as a basis of their argument.

There is no merit in petitioners' argument that the decision below conflicts with the Ninth Circuit's own decision in *Retana v. Apartment, Motel, Hotel and Elevator Operators Union, Local No. 14*, 453 F.2d 1018 (9th Cir. 1972) or with the Third Circuit's decision in *Brady v. Trans World Airlines, Inc.*, 401 F.2d 87 (3rd Cir. 1968). Pet. 27-28. The court below, citing these cases, recog-

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[23]Neither case cited *Lockridge*

nized that *Retana* and *Brady* held that "the duty of fair representation requires unions to explain to members of the bargaining unit their rights and duties under the collective bargaining agreement." 617 F.2d at 1331; Pet.App. 19. The court of appeals applied that principle to this case and held that it was "convinced that the union supplied the employees with repeated and adequate warnings that the misconduct of which they were found guilty could be the basis for their failure to advance to Class A status." *Id.* Indeed the warnings went much farther and specified that misconduct was cause for "deregistration." 617 F.2d at 1331-32; Pet.App. 19-20. "...[W]arnings to longshoremen not to engage in such misconduct abound in the record". 617 F.2d at 1332; Pet.App. 21.

Petitioners' contention that the court of appeals disregarded the teachings of this Court and contributed to existing conflicts with other circuits finds no support in the opinion below or in the opinions of other courts of appeals. Petitioners' real quarrel is not with the legal principles enunciated by the court of appeals, which are unexceptionable, but with the affirmance by that court of the district court's findings of fact. However, as we have pointed out, those findings of fact are amply supported by the evidence and are not clearly erroneous.

Indeed, the Petitioners concede the point, albeit grudgingly: "While purporting to apply the 'bad faith or arbitrariness standard' (617 F.2d at 1330, A17), the panel actually departed from it." Pet. 27. What the court of appeals decision reveals is that it did not depart from this standard but that it carefully examined each of the four criteria utilized in the deregistration process and concluded that they were "neither arbitrary, nor irrational. Rather, each is justifiable as relevant to the qualifications for employment. . ." 617 F.2d. at 1333; Pet.App. 23.

Petitioners do not really disagree with the court's statement of legal principles. They disagree with the court's affirmance of the district court's findings which establish that the union did not breach its duty of fair representation.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

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